MARK SYSTEMS, INC.

IBLA 70-557 thru 560 Decided March 23, 1972

Appeal from decision of Nevada land office, Bureau of Land Management, rejecting mineral lease applications N-4246 thru N-4249 in the Lake Mead National Recreation Area.

Affirmed.

Federal Employees and Officers: Authority to Bind Government

Reliance upon information or opinion of any officer, agent or employee or records maintained by land offices cannot bind or estop the United States or operate to vest any right not authorized by law.

Act of October 8, 1964--Mineral Lands: Leases

Where the state director interprets the regulation which reserves to him the right to offer competitively a lease for any land applied for within the Lake Mead Recreation Area if, in his judgment, there is evidence of a competitive interest in the land, his decision that no lease would issue without competitive bidding will be affirmed if on appellate review it is found to be the conclusion which the Board would have reached independently.

APPEARANCES: James C. Gaither, Cooley, Crowley, Gaither, Godward, Castro & Huddleson, San Francisco, California, for appellant.

OPINION BY MR. STUEBING

Mark Systems, Inc. has appealed to the Director of the Bureau of Land Management from a decision of the land office dated April 28,

1970, which rejected its applications 1/ for four mineral leases for copper in the Lake Mead National Recreation Area (hereinafter referred to as Recreation Area). 2/ The land office held that a competitive interest existed as evidenced by another application 3/ and inquiry 4/, and that no lease would issue without competitive bidding. Appellant's applications were rejected in their entirety, and appelland was advised that it would be informed about the details of forthcoming competitive bidding.

Appellant's version of the facts and its arguments as set out in its statement of reasons for appeal follow. After determining that there was evidence of mineralization in the area under question, appellant noted an apparent discrepancy in the boundaries of the Recreation Area as described by two United States Geological Survey maps. If the lands were outside the boundaries of the Recreation Area, as shown by one of the maps, they would be subject to location and staking of mining claims. If the lands were within the boundaries of the Recreation Area, as shown by the other map, they would be leasable subject to the conditions of 43 CFR subpart 3566 (1972). To resolve the conflict, appellant's representatives visited the Las Vegas district office to examine the master title plat for T. 27 S., R. 65 E., M.D.M., Clark County, Nevada. Appellant alleges that the plat showed the land in issue to be outside the boundaries of the Recreation Area. An official of the Las Vegas district office allegedly confirmed that (1) the land was not included within the boundaries of the Recreation Area; (2) the Las

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1/ Appellant submitted its applications on December 18, 1969. The applications were filed pursuant to regulations, 43 CFR 3566 formerly 43 CFR 3326, promulgated by the Secretary of the Interior to administer the Act of October 8, 1964, 16 U.S.C. 460n (1964), which was enacted to provide for the administration of lands within the boundaries of the Lake Mead National Recreation Area. The applications describe portions of sections 19, 20, 29, 30, 31 and 32, all in T. 27 S., R. 65 E., M.D.M., Nevada.

2/ Under the revised Departmental appeals procedure all pending appeals to the Director of the Bureau of Land Management have been transferred to the Board of Land Appeals, Office of Hearings and Appeals. Cir. 2273, 35 F.R. 10009, 10012 (June 18, 1970).

3/ On January 7, 1970, Edward Seggerson, Jr. filed applications for five mineral leases, three of which were in conflict with those of appellant.

4/ Humble Oil and Refining Company informed the Bureau of Land Management by letter on January 9, 1970, that it was interested in applying for mineral leases. Its interest included parts of the same land covered by appellant's lease applications. Humble indicated an interest on sections 19, 20, 29, 30, 31, 32, T. 27 S., R. 65 E., M.D.M., Nevada, and sections 6, 7, T. 28 S., R. 65 E., M.D.M., Nevada.

Vegas district office plat showed no changes in the boundaries as of August 11, 1969; and (3) the files of the Bureau of Land Management contained nothing to show that any changes should have been made on the plat.

Appellant alleges that in reliance on the maps, records, and representations of Bureau of Land Management personnel, it expended $40,000 in staking, filing, surveying, improving roads, initiating a geophysical analysis, clearing drill sites, and designing a drilling program to perfect the mining claims.

Thereafter appellant was notified by the Recreation Area's acting superintendent that its mining claims were located within the boundaries of the Recreation Area. Subsequent investigation of the master title plat in the Reno land office by another of appellant's consultants confirmed the opinion of the Recreation Area personnel. Appellant attributes the error to failure of the Las Vegas district office to note on its plat that all of T. 27 S., R. 65 E. had been included within the Recreation Area by Congress in 1964.

Appellant claims that at subsequent meetings with personnel of the Bureau of Land Management and the Park Service its good faith and detrimental reliance on the plat and assurances of Bureau of Land Management personnel were established. Appellant was allegedly assured that no permanent damage had been done and that the scheduled drilling would only be postponed for the duration of time necessary to expeditiously process mineral lease applications. Appellant alleges that the prospect of competitive bidding was not mentioned.

Appellant argues that not only did it locate land and expend $40,000 which would not have been necessary had it not relied on records and information furnished by the Bureau of Land Management, but that its activities inspired in its competitors an interest which otherwise would not have existed. Appellant also maintains that it has been prejudiced by the disclosures it made as to the mineral character of the land when it filed its applications for mineral leasing. Competitive leasing under these circumstances, appellant contends, is unfair because the other parties who have had no expenses can rely on appellant's efforts in submitting their bids. Appellant attributes its "competitively disadvantageous position" to the Bureau of Land Management, whose "action, conduct, and decisions" may result in the "possible loss of its investment in an essentially arbitrary process of competitive bidding."

After appellant had determined that it was likely that the Bureau of Land Management would offer the land in question for competitive leasing, it arranged to meet with the Bureau of Land Management personnel to discuss its pending applications. According to appellant, the Bureau personnel, including the state director, the land office manager, and assistant manager, asserted that the competitive lease provision, "* * * requires the land to be submitted to competitive bidding whenever competitive interest appears, irrespective of any other consideration."

The governing regulation provides:

§ 3566.5 Lease by competitive bidding.

> The right is reserved to offer competitively a lease for any land applied for under this part if, in the judgment of the State Director, there is evidence of a competitive interest in the land, or if the Geological Survey finds that the land contains a deposit in paying quantities of the mineral to be leased.

It is the contention of appellant that the Bureau of Land Management erred in its construction of this regulation. Appellant maintains that the Bureau construed the regulation to make competitive bidding mandatory upon any showing of competitive interest. Appellant's interpretation of the regulation is that when a state director becomes aware that there is competitive interest, he has discretion either to grant non-competitive leases upon written application or to offer them by competitive bidding, but competitive bidding is not mandatory. Outlining factors which it feels should be considered in the exercise of this discretion, appellant argues that the Bureau of Land Management, in light of this fact situation, should have issued leases to it without competitive bidding. Appellant concludes that "[to] the extent that the decision to submit the leases to competitive bidding * * * can be characterized as an exercise of discretion, it was unreasonable, arbitrary and capricious and an abuse of discretion."

In responding to appellant's contentions, we deem it pertinent to make the following observations. In both the statute and the regulation, the provisions for mineral leasing in the Recreation Area describe the land which is subject to leasing as that "which is shown on a certain map identified as 'boundary map, RA-LM-7060B, revised July 17, 1963', which is on file and which shall be available for public inspection in the office of the Director of the National Park

Service and in the headquarters office of the superintendent of the Lake Mead National Recreation Area." 5/

Specific areas are closed to all mineral disposal. These areas are described by referring the applicant to the boundary map described above. It is apparent that appellant did not check the boundary map before it began its exploration. Moreover, the Las Vegas district office of the Bureau of Land Management is not the repository of the official land title and status records. These are maintained in the Reno land office.

Examination of a copy of a print of the plat dated January 1, 1968, taken from the state office's microfilmed control document index record, shows a notation in the remarks column of the master title plat that all of T. 27 S., R. 65 E. was included within the boundaries of the Recreation Area by virtue of the Act of October 8, 1964. The certifying officer of the state office has attested that the official land office master title plat, a copy of which the Las Vegas office had, was microfilmed from the security roll in January 1968. Further, he has certified that the inclusion of the township in the withdrawn area has been noted on the plat since April 18, 1966. It is conceivable that appellant's representatives failed to observe that the township was included in the withdrawal. However, the notation was on the plat.

The Department can bear no responsibility for appellant's failure to ascertain the status of the land prior to the initiation of its exploration activities. Appellant failed to inspect the boundary map on file with the National Park Service to which reference is directed by both the statute and the governing regulations, supra. Appellant's representatives attempted to ascertain the status from the records in the district office of the Bureau of Land Management rather than go to the Reno land office where official public land title and status records are maintained. Moreover, the plat that its representatives actually examined carried an accurate notation that the land was withdrawn pursuant to the Act of October 8, 1964, so that even though they failed to resort to the best sources of information, the record that they did inspect carried the correct information, which they apparently simply overlooked. Finally, the acting superintendent of the Lake Mead Recreation Area reports that appellant's employees drove past a National Park Service boundary sign on their way toward locating over 90 mining claims, and that they subsequently admitted that they had seen the sign and ignored it.

5/ Direct quotation from 43 CFR 3566.1. The language of Sec. 2 of the statute (78 Stat. 1039; 16 U.S.C. 460 n) is almost identical, being, perhaps even more explicit.

We turn now to appellant's contentions that an employee of the Bureau made a statement to the effect that the land was not withdrawn. The Department's position is well defined by regulation and precedent. The regulation, 43 CFR 1810.3, provides:

> (a) The authority of the United States to enforce a public right to protect a public interest is not vitiated or lost by acquiescence of its officers or agents, or by their laches, neglect of duty, failure to act or delays in the performance of their duties.
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> (b) The United States is not bound or estopped by the acts of its officer or agents when they enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.
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> (c) Reliance upon information or opinion of any officer, agent or employee or on records maintained by land offices cannot operate to vest any right not authorized by law (Emphasis supplied).

Application of this rule is found in Southwest Salt Company, 78 I.D. 82 (1971); H. E. Baldwin and John R. Keeling, 3 IBLA 71 (1971); Harold E. and Alice L. Trowbridge, A-30954 (January 17, 1969).

The remaining issue is whether the state director properly interpreted the competitive lease provision of the regulations when he ruled that because competitive interest was evidenced, the land would be offered for competitive bidding. Even when we apply appellant's interpretation of the regulation, i.e., "the state director * * * has discretion once competitive interest is found to exist, to determine whether to grant the leases on written application or to offer them competitively," we are not disposed to reverse the decision made by the state director, in the exercise of his judgment, since we would have reached the same result based upon the facts of the case.

Appellant has concluded on the basis of his discussions with the Bureau of Land Management personnel, that no discretion was exercised. In other words, appellant contends that the sole basis of the decision was that there was evidence of competitive interest, and that the state director wrongly concluded that he had no authority to lease the land non-competitively under those circumstances.

While we agree with the appellant that the language employed by the regulation does not impose an absolute mandate to lease by competitive bidding whenever there is evidence of competitive interest, neither does it specifically confer any authority to lease non-competitively despite competitive interest. Regardless of that issue, appellant has not established that an administrative decision to offer a lease competitively constitutes an abuse of discretion where that decision is based upon a determination that sufficient competitive interest exists to warrant that procedure. The state director was obliged to formulate a judgment as to whether there was evidence that a competitive interest existed. Having determined that such interest existed, he was then at liberty to exercise discretion to lease or to refrain from leasing.

We note that in separate reports to the Nevada state office both the Chief, Conservation Division, Geological Survey and the Boulder City office of the National Park Service recommended that the land be leased competitively.

Despite appellant's contention that the decision to offer the land for competitive leasing was unreasonable, and, to the extent that it could be characterized as an exercise of discretion, it constituted an abuse of that discretion, we find no evidence which would compel the conclusion that the lands should be leased noncompetitively in this case. We therefore need not resolve the question of whether the regulation is so constructed as to allow the state director discretion to lease noncompetitively despite evidence of competitive interest.

Appellant's request for oral argument is denied as the pertinent issues have been fully argued in its statement of reasons for appeal. Consequently, oral argument would serve no useful purpose.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision of the Nevada land office is affirmed.

Edward W. Stuebing, Member

We concur:

Joan B. Thompson, Member

Frederick Fishman, Member